REVISIONAL CRIMINAL.

Before Khosla and Falshaw, JJ.

STATE,—*Petitioner.*

versus

S. GURCHARAN SINGH,—*Respondent.*

1950

December, 5th

Criminal Rivision No. 893 of 1949.

Indian Penal Code (Act XLV of 1860)—Section 409—Prevention of Corruption Act (II of 1947)—Section (5)(1)(c) —Whether pro-tanto *repeals section 409 Indian Penal Code so far as offences by public servants are concerned—Public servant committing breach of trust—arrested and released on bail while such public servant—Dismissed thereafter—Challan put in Court after dismissal—Cognisance of the case by Court—date of—Whether the date on which bail granted or challan put in—Trial whether should be under section 409 Indian Penal Code or under section 5 of Prevention of Corruption Act (II of 1947)—Sanction under section 6 of Act II of 1947 or section 197 of the Code of Criminal Procedure (Act V of 1898)—Whether necessary —General Clauses Act (X of 1897)—Section 26—Whether precludes repeal by implication—General Principle stated.*

Held, that as long as Section 5 of Act II of 1947, remains in force, the provisions of section 409, Indian Penal Code, so far as they concern offences by public servants are *pro-tanto* repealed by section 5(1)(c) of Act II of 1947.

Held, that the term 'taking cognizance' has no connection with entertaining a bail application while a case is still at the stage of police investigation. Dealing with a bail application is something quite separate and distinct from taking cognisance of a case. The Court takes cognisance of a case when the challan is put in. Accordingly if the accused was a public servant at the time the offence of breach of trust was committed but has ceased to be a public servant at the time the challan was put in, he is to be tried under section 5(1)(c) of the Prevention of Corruption Act, and not under section 409 Indian Penal Code. No sanction is, however, necessary under section 6 of Act II of 1947 as the word "is" in the phrase "is employed" which is used in section 6 of the said Act refers to the date on which the Court takes cognisance of the case and not to the date on which the alleged offence was committed. This protection is afforded to a public servant while still in office and does not extend to him who had already been discharged from service before the case was brought against him.

Held, that the terms of section 26 of the General Clauses Act, broad as they are, do not preclude the possibility of repeal by implication. There is no doubt that as a matter of general principle repeal by implication is not favoured but there are obviously exceptions to this general principle.

Suraj Narain Chaube v. *Emperor* (1), *Prosad Chandra Banerjee* v. *Emperor* (2), *Emperor* v. *P. A. Joshi* (3), relied upon. *Sugan Chand* v. *Seth Naraindas* (4), *S. Y. Patel* v. *State* (5), not approved.

Case reported by S. S. Dulat, Esquire, I.C.S., Sessions Judge, Delhi, with his letter No. 2375-R.K., dated 3rd September 1949, under Section 438 of the Code of Criminal Procedure. Case committed by Shri P. N. Bhanot, Magistrate, 1st Class, Delhi, dated the 15th November, 1948.

The facts of the case are as follows :—

On 30th April, 1948, Gurcharan Singh who was then employed as a Field-Inspector in the office of the Custodian of Evacuees Property, was arrested on a charge under Section 409, Indian Penal Code, a case having been previously registered against him. On 1st May, an application for bail was made and Gurcharan Singh was released on bail by Mr. P. N. Bhanot, Magistrate, 1st Class. On 8th May Gurcharan Singh was discharged from Service. On 23rd July 1948, a challan was put into the court of Mr. Bhanot, against Gurcharan Singh under Section 409, I.P.C. On 17th August an application was made on behalf of the accused that the prosecution under Section 409, I.P.C., could not proceed against him in view of the provisions of Act II of 1947 and a decision of the East Punjab High Court in *Ram Rang and Yog Raj* v. *the Crown*, (Criminal Revision No. 191 of 1948). It appears that the Crown counsel had not till then seen the High Court decision in the above-mentioned case and an adjournment for the purpose was obtained. On 17th September 1948, an application was made on behalf of the Crown that the facts alleged against the accused would disclose an offence not only under Section 409, I.P.C., but also under Section 5 of Act II of 1947 and the prosecution should, therefore, be allowed to proceed with the case. To this application objection was taken that no sanction for prosecution had been obtained under Section 6 of Act II of 1947 and the Court was, therefore, not competent to take cognisance of the offence.

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(1) A.I.R. 1938 All. 513 (S.B.)
(2) A.I.R. 1943 Cal. 527 (D.B.)
(3) A.I.R. 1948 Bom. 248
(4) A.I.R. 1932 Sind. 177
(5) A.I.R. 1937 Nag. 293

The learned Magistrate considered the whole position and came to the conclusion that the case under Section 409, I.P.C., could not proceed at all in view of the decision of the High Court in *Ram Rang and Yog Raj* v. *Crown,* and that the prosecution could not proceed under Section 5 of Act II of 1947 either as no sanction under Section 6 had been obtained. The learned Magistrate found that it was no answer to the objection that Gurcharan Singh was no longer a public servant when the case was put into Court. In the result the learned Magistrate made an order discharging the accused. Against the order a petition for revision has been filed on behalf of the Crown.

It is common ground that the order of the learned Magistrate, although purporting to be one of discharge, is really an order refusing to take cognisance of the case and the question, therefore, is, whether this view of the learned Magistrate is in law sound.

In *Ram Rang and Yog Raj* v. *Crown,* a copy of which has been filed in this case, Mr. Justice Falshaw had to consider the question, whether in view of the enactment of Act II of 1947, a public servant could at all be proceeded against under Section 409 of the Indian Penal Code, and he came to the distinct finding that "for the period of three years during which section 5 of the Act is to remain in force the provisions of section 409 of the Indian Penal Code so far as they relate to public servants are repealed." The learned Public Prosecutor first contended that the decision in *Ram Rang* v. *Crown* was not correct, and that the Crown intended to avail of this opportunity, if possible, to have a more authoritative decision on this question. He, however, frankly admitted that the view of the learned Magistrate is fully in accordance with the view expressed in *Ram Rang* v. *Crown,* and that the view must prevail unless and until it is upset by a more authoritative decision. He was, however, anxious that the grounds of his criticism of the High Court's decision may be indicated so that it may not be said subsequently that he was not seriously challenging the decision. Learned counsel's argument briefly is that in the High Court due weight was not given to the provision contained in section 26 of the General Clauses Act and the views of the English text-writers relied upon were not considered in their full context. It is, I feel, unnecessary to enter into the whole argument, as it is clear, and is in fact admitted, that the decision of the High Court is binding and, therefore, the view adopted by the learned Magistrate must be taken as sound.

The next contention on behalf of the Crown is that leaving section 409, I.P.C. alone the prosecution were entitled to prove that an offence under section 5 of Act II of 1947 had been committed and the learned Magistrate was

not right in holding that for the proceedings under section 5 previous sanction of the appropriate authority was necessary under section 6. Section 6 of the Act is in these words :—

> "No Court shall take cognizance of an offence punishable under section 161 or section 165 of the Indian Penal Code, or under subsection (2) of section 5 of this Act, alleged to have been committed by a public servant except with the previous sanction—
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> (a) in the case of a person who is employed in connection with the affairs of the Federation and is not removable from his office save by or with the sanction of the Central Government or some higher authority, Central Government;
>
> (b) in the case of a person who is employed in connection with the affairs of the province and is not removable from his office save by or with the sanction of the Provincial Government or some higher authority, Provincial Government;
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> (c) in the case of any other person, of the authority competent to remove him from his office."

The argument in this connection is that under section 6, sanction is required only in the case of a public servant, and where the accused person is no longer a public servant when the accusation is made and the case against him proceeded with, no sanction is necessary. Before entering into the larger argument it is convenient to dispose of one matter which apparently weighed with the learned Magistrate. He was of the view that he had taken cognizance of the offence on 1st May 1948, when he allowed bail, and since Gurcharan Singh was yet a public servant on that day the proceedings were incompetent. The learned Public Prosecutor contends, and very rightly, that the mere grant of bail did not amount to taking cognizance of the offence within the meaning of section 6, and that the learned Magistrate was called upon to take cognizance of the case only on 23rd July, when the Police were ready with the case and put in a detailed report. I am fully satisfied that the mere consideration of the question, whether an accused person should or should not be allowed bail, cannot mean taking cognizance of the offence for which the accused may have been arrested. It frequently happens when investigation by the Police is yet pending that accused persons make applications for bail and quite often those applications are considered by the Court of Sessions or the High Court. It is impossible to agree that the mere consideration of such petitions would amount to

taking cognizance of the offence by such Courts. Under section 193, Cr. P.C., a court of Sessions is debarred from taking cognizance of any offence unless the accused has been committed to it by a Magistrate, and similarly, the High Court cannot take cognizance of any offence except on a commitment made to it, so that it is abundantly clear that the Court of Sessions and the High Court cannot possibly be said to take cognizance of an offence merely because an application for bail may be made to those Courts. The conclusion must, therefore, be that the mere fact, that bail had been allowed by the learned Magistrate when the accused was yet a public servant, is of no particular consequence. The Code of Criminal Procedure lays down in section 190 the various modes in which Magistrates take cognizance of offences. Those modes are either (a) upon a complaint of facts constituting the offence, or (b) upon a report in writing of such facts made by any Police-Officer, or (c) upon information received from any person other than a Police-Officer or upon the Magistrate's own knowledge or suspicion. In this case the Police report in writing was made on 23rd July 1948, and it is clear that the Magistrate was called upon to take cognizance only then. The real and substantial question is whether the accused being no longer a public servant on 23rd July 1948, when the case was put into Court any sanction for his prosecution was necessary under section 6 of Act II of 1947. Both counsel admitted before me that there was no decided case directly bearing on section 6 of the Act. The learned Public Prosecutor, therefore, largely depended on the decisions relating to section 197 of the Criminal Procedure Code which contains a somewhat analogous provision. That Section says :—

> " When any person who is a Judge within the meaning of section 19 of the Indian Penal Code, or when any Magistrate or when any public servant who is not removable from his office save by or with the sanction of the Provincial Government or some higher authority, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no court shall take cognizance of such offence except with the previous sanction,—
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> (a) in the case of a person employed in connection with the affairs of the Federation, of the Governor-General exercising his individual judgment; and
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> (b) in the case of a person employed in connection with the affairs of a province, of the Governor of that Province exercising his individual judgment.

It is contended that the provision contained in this section of the Criminal Procedure Code is substantially the same as the provision contained in section 6 of Act II of 1947, and the decided cases concerning section 197 should govern section 6. As far as section 197 is concerned, I am satisfied that the weight of judicial authority is distinctly in favour of the view of the learned Public Prosecutor that previous sanction is necessary only where the accused is still a public servant, when the case is taken to Court, and not otherwise. The learned counsel for the respondent referred to two decisions to the contrary, A.I.R. 1932 Sind 177 and A.I.R. 1937 Nagpur 293—a decision of a Single Bench of the Nagpur High Court. The view adopted in these two decisions was that the protection given to the public servant by section 197, Criminal Procedure Code, was very wide and that the mere fact, that the accused had ceased to be a public servant when the proceedings were brought does not do away with the necessity of a previous sanction. In I.L.R. 1938 Allahabad 776, the same question came up before Mr. Justice Bennet who came to the conclusion that it was not sufficient that the accused should be public servant at the time of the offence but he must also be a public servant at the time when he is accused, that is when the accusation is made against him either by a complaint or a Police report, and when he is no longer a public servant at the time of the Police report no sanction is necessary. In 1943, the same question came up before a Division Bench of the Calcutta High Court in 1 Calcutta 113. The two decisions cited on behalf of the respondent, that is, A.I.R. 1932 Sind 177 and A.I.R. 1937 Nagpur 293, were considered but the Calcutta High Court were unable to follow them. The same matter was for consideration before a Division Bench of the Bombay High Court in A.I.R. 1948 Bombay 248, and once again A.I.R. 1937 Nagpur 293 was considered and not followed. The learned Counsel for the respondent conceded in view of the authorities that the view of the Allahabad, Calcutta, and Bombay High Courts was against him, and that this represented the bulk of judicial authority. He, however, contended that this interpretation of the language of section 197 depended on the peculiar language of that section, and in particular on the use of the verb 'is' in the opening line of the section, and since the language of section 6 of Act II of 1947 was different the same interpretation need not be placed on it. It is true that section 6 of Act II of 1947 is drafted differently from section 197, Criminal Procedure Code, but on a reading of the two sections as a whole it does not appear that any different result is intended. The clue to my mind is to be found in the language of Clauses (a) and (b) of section 6. Clause (a) runs :—

> "In the case of a person who is employed in connection with the affairs of the Federation"

and the reference obviously is to the subsisting employment of the person concerned. In other words clause (a) contemplates the necessity of a sanction in the case of a person who is actually employed and not merely of a person who may previously have been employed as such. Although, therefore, I agree with the learned counsel for the respondent that the matter is not free from difficulty, it seems to me that the substance of the provisions of section 6 of Act II of 1947, is the same as section 197, Criminal Procedure Code, and in view of the authorities under section 197, Criminal Procedure Code, the correct view to my mind would be that under section 6 of Act II of 1947, no previous sanction for prosecution is necessary where the accused has ceased to be a public servant at the time the case is put into Court. On this view of the matter it is clear that the order of the learned Magistrate refusing to proceed with the case under section 5 of Act II of 1947, is not sound. I, therefore, order that the record of this case be forwarded to the High Court with the recommendation that the order of the learned Magistrate be set aside and the case remanded to him for proceeding with it according to law.

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MR. BISHAN NARAIN Advocate, for petitioner.

S. GURDEV SINGH, Advocate, for Respondent.

JUDGMENT.

D. FALSHAW, J. The circumstances giving rise to this reference by the learned Sessions Judge at Delhi, Cr. R. No. 893 of 1949, are as follows. Gurcharan Singh, respondent, was formerly employed as a Field Inspector in the office of the Custodian of Evacuees' Property and it is alleged that while acting in this capacity he misappropriated some evacuees' property over which he had dominion. The case was first registered as a result of report to the Police on the 2nd of January, 1948, and as a result of the investigation by the Police Gurcharan Singh was arrested on the 30th of April, 1948, and released on bail on the following day, the 1st of May. The chalan was actually put into the Court of a Magistrate on the 23rd of July 1948, under section 409, Indian Penal Code. On the 18th of August 1948, preliminary objections to the legality of the Court's proceeding with the trial were raised on behalf of the accused. These objections were primarily

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based on my decision in Criminal Revision No. 191 of 1948, decided on the 13th of July 1948, in which I held that as long as the provisions of section 5 of the Prevention of Corruption Act, Act II of 1947, remained in force, section 409, Indian Penal Code, so far as it related to offences by public servants, stood repealed. In effect this decision meant that if a public servant was alleged to have committed an offence which fell either under section 409, Indian Penal Code, or section 5 (1) (c) of the Prevention of Corruption Act, he could only be prosecuted under the latter section, and in that case the sanction of the appropriate authority mentioned in section 6 of the Prevention of Corruption Act was necessary before any Court could take cognizance of the case. It is not disputed that for the case under section 409, Indian Penal Code, against Gurcharan Singh no sanction of any authority had been obtained. The learned trial Magistrate rightly felt that he was bound by this decision, and he also rejected another ground on which it was contended on behalf of the Crown that the case could continue notwithstanding my decision. This contention was that at the time when the Court took cognizance of the case Gurcharan Singh was no longer a public servant. It is in fact not in dispute that he was discharged from Government service on the 8th of May 1948, i.e., on a date intervening between the date on which his bail application had been entertained and accepted and the date on which the actual chalan was presented before the Court. The learned Magistrate, however, was of the opinion that he had taken cognizance of the case on the 1st of May when he applied his mind to the facts of the case in dealing with the bail application of the accused. He, therefore, held that the case could not proceed without the sanction of the appropriate authority mentioned in section 6 of Act II of 1947 and he therefore discharged the accused on the 15th of November 1948. A revision petition was filed on behalf of the Crown in the Court of the learned Sessions Judge, who, by his order, dated the 13th of July 1949, held that he was bound by my decision regarding the section under which proceedings must be taken against

the accused, but at the same time after considering the relevant authorities held that Gurcharan Singh was no longer a public servant when the trial Court took cognizance of the case and that therefore no previous sanction under section 6 of the Prevention of Corruption Act was necessary. He accordingly forwarded the case to this Court with the recommendation that the order of the trial Magistrate discharging the accused be set aside, and the case remanded to him for proceeding with it according to law. When the case came before a learned Single Judge for admission he considered the point involved important enough for reference to a Division Bench. The case has accordingly been heard by us along with four other revision petitions, *Balwant Rai* v. *The Crown* (1), *Major T. S. Gill* v. *The State* (2) *Captain Ram Parkash* v. *The Crown* (3), and *Kharak Singh* v. *The State* (4), in which *inter alia* the effect of the Prevention of Corruption Act of 1947 on section 409, Indian Penal Code, is involved.

The first question to be decided is whether it was correctly decided by me in Criminal Revision No 191 of 1948, that as long as section 5 of Act II of 1947 remains in force section 409, Indian Penal Code, *pro tanto* stands repealed as regards offences alleged to have been committed by public servants. This question obviously requires consideration of the scheme and purpose of Act II of 1947, which came into force on the 11th of March, 1947. It is headed "An act for the more effective prevention of bribery and corruption" and the opening words of the Act itself are "whereas it is expedient to make more effective provision for the prevention of bribery and corruption, it is hereby enacted as follows." Section 1 deals with the short title, extent and duration of the Act, regarding which it is sufficient to say that subsection (3) provides that section 5 shall remain in force for a period of three years from the commencement of the Act, and this has now been extended by a further

(1) Cr. R. No. 398 of 1949
(2) Cr. R. 1073 of 1949
(3) Cr. R. 5 of 1950
(4) Cr. R. No. 779 of 1950

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period of two years. Section 2 merely provides that for the purposes of the Act "Public servant" means a public servant as defined in section 21 of the Indian Penal Code. Section 3 provides that notwithstanding anything contained in the Criminal Procedure Code offences punishable under section 161 or 165, Indian Penal Code, shall be deemed to be cognizable offences for the purposes of the Criminal Procedure Code, with the proviso that without an order from a first class Magistrate no Police officer below the rank of Deputy Superintendent shall either investigate such an offence or make any arrest without a warrant. Section 4 is more revolutionary, since without mentioning the Evidence Act specifically it modifies certain provisions of this Act by implication, since, it provides that where in the trial of an offence under section 161 or 165, Indian Penal Code, it is proved that an accused person has accepted or obtained, or agreed to accept or attempted to obtain, for himself or any other person, any gratification other than legal remuneration or any valuable thing it shall be presumed unless the contrary is proved that he accepted or obtained, or agreed to accept or attempted to obtain, that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in the said section 161, or, as the case may be, without consideration or for a consideration which he knows to be inadequate. There is, however, a proviso that the Court may decline to draw such a presumption if the gratification or thing aforesaid is in its opinion so trivial that no inference of corruption may fairly be drawn. Section 5 proceeds to deal with the offence of criminal misconduct in discharge of official duty. The section reads :—

> "1. A public servant is said to commit the offence of criminal misconduct in the discharge of his duty—
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> (a) If he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person any gratification (other than legal remuneration) as a motive or reward such as

is mentioned in section 161 of the Indian Penal Code, or

(b) if he habitually accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any valuable thing without consideration or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, or

(c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do, or

(d) if he, by corrupt or illegal means or by otherwise abusing his position as public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage.

2. Any public servant who commits criminal misconduct in the discharge of his duty shall be punishable with imprisonment for a term which may extend to seven years, or with fine, or with both.

3. In any trial of an offence punishable under subsection (2) the fact that the accused person or any other person on his behalf is in possession, for which the accused person cannot satisfactorily account, of

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pecuniary resources or property disproportionate to his known sources of income may be proved, and on such proof the Court shall presume, unless the contrary is proved, that the accused person is guilty of criminal misconduct in the discharge of his official duty and his conviction therefor shall not be invalid by reason only that it is based solely on such presumption."

The next section No. 6 refers to sanction for prosecution and reads:—

"No Court shall take cognizance of an offence punishable under section 161 or section 165 of the Indian Penal Code or under subsection (2) of section 5 of this Act, alleged to have been committed by a public servant except with the previous sanction—

(a) in the case of a person who is employed in connection with the affairs of the Federation and is not removable from his office save by or with the sanction of the Central Government or some higher authority, Central Government;

(b) in the case of a person who is employed in connection with the affairs of a Province and is not removable from his office save by or with the sanction of the Provincial Government or some higher authority, Provincial Government;

(c) in the case of any other person of the authority competent to remove him from his office."

Finally section 7 provides that any person charged with an offence punishable under section 161 or 165 of the Indian Penal Code or under subsection (2) of section 5 of the Act shall be a competent witness for the defence and may give evidence on

oath in disproof of the charges made against him or any person charged together with him at the same trial, and then follow certain safeguards regarding its being optional for the accused to appear as his own witness, and regarding the absence of any presumption against him if he does not choose to appear as a witness, and the nature of the questions which can be asked from him if he does so.

The effects of the Act may now be summed up as follows:—

(1) Public servants accused of having committed offences under sections 161 and 165 of the Indian Penal Code may still be tried on charges under those actual sections, but even so, their trials will be governed by the other changes introduced by the Act regarding the presumptions to be drawn against them, the necessity for the sanction of the appropriate authority under section 6, and the privilege of the accused to give evidence on oath as a competent witness if he so desires under section 7.

(2) Subsections (1) and (2) of section 5 are more or less based on sections 161 and 165 of the Indian Penal Code but create new offences by somewhat enlarging the scope of these sections. Section 5 (1) (d) creates a new offence of obtaining favours by abuse of official position. Section 5 (1) (c), with which we are primarily concerned in this case is for all practical purposes the same as section 409, Indian Penal Code, so far as it relates to offences by public servants, and it is difficult, if not impossible, to conceive of any such offence committed by a public servant which would be punishable under one of these sections and not under the other.

(3) A radical change is introduced regarding the necessity for previous sanction for prosecution. This aspect of the prosecution of public servants was hitherto governed entirely by the provisions of section 197 of the Criminal Procedure Code, subsection (1) of which reads:—

> "When any person who is a judge within the meaning of S. 19 of the Indian Penal

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Code, or when any Magistrate, or when any public servant who is not removable from his office save by or with the sanction of a Provincial Government or some higher authority, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take congnizance of such offence except with the previous sanction—

(a) in the case of a person employed in connection with the affairs of the Federation, of the Governor-General exercising his individual judgment; and

(b) in the case of a person employed in connection with the affairs of a Province, of the Governor of that Province exercising his individual judgment."

Thus two major changes have been introduced by the new Act. The first of these is that while under section 197 the sanction of the Governor-General or the Provincial Governor, as the case may be, was only necessary for the prosecution of public servants who were not removable from their offices save with the sanction of the Central Government or the Provincial Government respectively, no such qualification is contained in section 6 in which the words used are committed by a public servant. Thus under the Criminal Procedure Code no sanction was ever required to prosecute a public servant removable by a lesser authority than the Provincial or Central Government, whereas now the sanction of the appropriate authority is necessary for the prosecution of any public servant, however subordinate, alleged to have committed an offence under section 161 or 165 of the I.P.C. or under section 5 of the Act. The second change is that introduced by the omission in section 6 of the Act of the words appearing in section 197 "while acting or purporting to act in

the discharge of his official duty." This omission appears to be deliberate, and to have been made in consequence of decisions of various High Courts and the Federal Court to the effect that an officer who had accepted a bribe or embezzled Government property was neither acting nor purporting to act in the discharge of his official duty, and that, therefore, no sanction for his prosecution was necessary. The sanction of the appropriate authority is, therefore, now necessary for the prosecution of any public servant under the Act.

(4) Another major change is the introduction by section 7 of the Act of the privilege of an accused person in a case under section 161 or 165, Indian Penal Code, or section 5 of the Act, to appear as a competent witness and give evidence on oath in disproof of the charges made against him or any other co-accused. So far as I am aware this is the first granting of such privilege to a person on trial for a criminal offence in this country. Thus, although neither the provisions of section 342 (4), Criminal Procedure Code, which specifically states that no oath shall be administered to the accused, and the latter part of section 5 of the Oaths Act of 1873, which provides that nothing herein contained shall render it lawful to administer in a criminal proceeding an oath or affirmation to the accused person, are mentioned at all in section 7, these provisions of law are clearly repealed by section 7 for the purpose of trials under the Act.

(5) There is also one important change regarding the sentences for embezzlement by a public servant. The penal clause, section 5(2), fixes a maximum sentence of seven years imprisonment or a fine, or both, for the offences set out in section 5(1) (a) (b) (c) and (d), whereas under section 409, Indian Penal Code, the words regarding sentence read:—

> "shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

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Thus not only is the maximum term of imprisonment under section 5 (2) for an offence under section 5 (1) (c) considerably less than that under section 409, I.P.C., but also under section 409, I.P.C., a sentence of imprisonment is mandatory, while under section 5 (2) the sentence need only be a fine without any sentence of imprisonment.

The question before us is whether in view of these changes introduced by Act II of 1947, particularly regarding the necessity for previous sanction of the appropriate authority for prosecution, the right of the accused to give evidence as a witness and the change of sentence, it is now open to the authorities concerned, when a public servant is accused of committing an offence which would be punishable either under section 409, Indian Penal Code, or section 5 (1) (c) of the Act, to choose which of these two sections the offender should be prosecuted under, and, by choosing to proceed under section 409, Indian Penal Code, to dispense with the necessity for any previous sanction in the case of a public servant removable from office by an authority subordinate to the Provincial or Central Government, and also to deny him the privilege of giving evidence on oath as a competent witness on his own behalf. *Prima facie* it would appear to be unlikely that this was the intention of the Legislature when it passed Act II of 1947, the avowed object of which was to deal more effectively with bribery and corruption of public servants, for which purpose the prevalent forms of these offences were collected into a single Act, and what was thought to be a more effective procedure for trying offences of this kind was introduced. The general impression that section 5 (1) (c) was intended to supersede section 409, Indian Penal Code, for offences of this type committed by public servants is greatly strengthened by the fact that the Act specifically provides for the trial of offences under sections 161 and 165, Indian Penal Code, with the procedural changes introduced by the Act, whereas section 409, Indian Penal Code, is nowhere mentioned in the Act. On behalf of the State reliance was chiefly placed, as

it was before me in the previous case, on the provisions of section 26 of the General Clauses Act which reads—

> "Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."

If this section is taken by itself, then clearly a public servant who has committed an offence falling either under section 409 or section 5 (1) (c) of the Act can be tried on a charge under either of these sections, and the only limitation is that he cannot be convicted and sentenced for the same offence under both of them. Clearly there would be no difficulty whatever in accepting the position of the State in the matter if Act II of 1947 simply made an offence already punishable under section 409, Indian Penal Code, punishable also under section 5 1(c) and went no further. There are, however, the three important changes regarding sanction, the right of the accused to give evidence on oath and the change in the quantum and nature of the sentence to be taken into consideration, and they certainly complicate the question. There is no doubt, as was contended by Mr. Bishan Narain on behalf of the State, that as a matter of general principle repeal by implication is not favoured. There are, however, obviously exceptions to this general principle. Such a case arose when a Full Bench consisting of seven Judges of the Lahore High Court considered the inconsistent provisions of section 162 of the Criminal Procedure Code and section 27 of the Evidence Act both of which were fundamental Acts of long standing, regarding the admissibility of statements made by accused persons in Police custody, and it was held by the whole Court, the decision being reported as *Hakam Khuda Yar* v. *Emperor* (1), that section 162 of the Criminal Procedure Code, the later Act, repealed section 27 of the Evidence Act. This decision was not reversed by

(1) A.I.R. 1940 Lah. 129

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any higher Court, and as a matter of fact section 162 of the Criminal Procedure Code was subsequently amended so as to leave the provisions of section 27 of the Evidence Act intact. In spite of the fact that nearly two and a half years have elapsed since my earlier decision on the point in dispute, there does not appear to be any decision of any of the High Courts in India, or the Federal Court or the Supreme Court, in which the same point has been considered, and in my opinion the most relevant authorities are still the passages from Craies on Statute Law, and Maxwell on the Interpretation of Statutes, on which my earlier decision was mainly based. The first of these passages from Craies, page 314, reads as follows:—

> "In Rv. Judge of Essex County Court (1887, 18 Q. B. D. 704) Esher M.R. laid it down as an ordinary rule of construction that 'where the Legislature has passed a new statute giving a new remedy, that remedy alone can be followed.' But the phrase 'new' as applied to a statute is either needless or ambiguous. The old distinction between '*vetera*' and '*nova statuta*' is obselete; and the word 'new' is insensible unless applied to statutes creating rights or remedies unknown to the common law or to previous enactments. And for modern use the rule could perhaps be more accurately laid down thus. In the case of an Act which creates a new jurisdiction, a new procedure, new forms or new remedies, the procedure, forms or remedies there prescribed, and no others, must be followed until altered by subsequent legislation."

The following passage is also from Craies, page 315—

> "In *Middleton* v. *Crofts* (1), Lord Hardwicke said:—'Subsequent Acts of

(1) (1736) 2 Atk. 650

Parliament in the affirmative, giving new penalties and instituting new modes of proceeding, do not repeal former methods and penalties ordained by preceding Acts without negative words.'

"If, however, as Lord Campbell said in *Mitchell* v. *Brown* (1), a later statute again describes an offence which had been previously created by a former statute and affixes a different punishment to it, and varies the procedure, or if the later enactment expressly altered the quality of the offence as by making it a misdemeanour instead of a felony or a felony instead of a misdemeanour, the later enactment must be taken as operating by way of substitution and not cumulatively'."

The next passage is from page 195 of Maxwell:—

"Indeed, it has been laid down generally, that if a later statute again describes an offence created by a former one and affixes a different punishment to it, varying the procedure—giving, for instance, an appeal where there was no appeal before—the earlier statute is impliedly repealed by it."

As against these passages of undoubted weight, the only fresh argument which Mr. Bishan Narain was able to advance was that the cases on which they were based were prior to the enactment of the English Interpretation Act of 1889 which in some respects is similar to the Indian General Clauses Act. Section 33 of this Act reads—

"Where an act or omission constitutes an offence under two or more Acts, or both under an Act and at common law, whether any such Act was passed before or after the commencement of

(1) (1859) 28 L.J.M.C. 65

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this Act, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those Acts or at common law, but shall not be liable to be punished twice for the same offence."

In essence this section is the same as section 26 of the General Clauses Act, the only change of any importance being the introduction of the words in the English Act "Unless the contrary intention appears" which do not appear in the Indian Act. I do not, however, consider that the fact that the cases relied on by Craies and Maxwell were prior to the Act of 1889, or the difference in the wording of section 33 of the Act and section 26 of the General Clauses Act, really have much effect on the argument, or on the principles set forth by Craies and Maxwell, which are obviously fundamental principles governing the interpretation of statutes. I do not consider that the terms of section 26 of the General Clauses Act, broad as they are, preclude the possibility of repeal by implication, and in order to decide the point it is again necessary to consider the provisions of Act II of 1947. There is no doubt whatever that this Act does repeal by implication certain other provisions in existing statutes. As I have already pointed out, section 7 repeals by implication, without mentioning them, certain provisions in section 342 of the Criminal Procedure Code and section 5 of the Oaths Act. The presumptions raised in section 4 and section 5 (2) also modify, and to that extent repeal certain provisions of the Evidence Act without mentioning this Act. The only provisions in the Act which expressly repeal or modify provisions of other statutes are those by which offences under sections 161 and 165, Indian Penal Code, are made cognizable offences, and those by which investigation or arrest without a warrant are taken away from Police Officers under the rank of Deputy Superintendent of Police, these being only minor changes. The major amendments to existing statutes in the Act are all only by implication, and it is, therefore, not

difficult to come to the conclusion that the Legislature by including the essentials of an offence under section 409, Indian Penal Code, by a public servant in section 5 (1) (c) also intended to supersede section 409, Indian Penal Code, so far as it concerns public servants by section 5 (1) (c), and to apply the procedural and other changes contained in the Act to public servants who committed offences punishable previously under section 409, Indian Penal Code. To hold otherwise would lead to an anomalous situation, and I must confess that I am unable to understand the attitude of the State in wishing still to have the liberty to proceed against public servants under section 409 of the Indian Penal Code, and thereby deny them the benefits of Act II of 1947 including the right to appear as witnesses, the necessity of sanction for their prosecution and the possibility not only of receiving a lesser maximum sentence of imprisonment, but also of not being sentenced to any imprisonment at all on conviction. I would, therefore, adhere to my previous decision and hold again that as long as section 5 of Act II of 1947 remains in force the provisions of section 409, Indian Penal Code, so far as they concern offences by public servants are *pro-tanto* repealed by section 5 (1) (c) of the Act II of 1947.

The other question for consideration is the effect of the fact that Gurcharan Singh respondent had been removed from public service before the chalan in the case against him was put into Court. This question falls into two parts, the first being whether the word ' is ' in the phrase ' is employed ' which is used both in section 197, Criminal Procedure Code, and in subsections (a) and (b) of section 6 of Act II of 1947 refers to the date on which the alleged offence was committed, or to the date on which the Court takes cognizance of the case, and the second being whether in the present case the Court took cognizance of the case on the date on which the chalan was presented before it, or on the date on which, immediately following his arrest, the accused applied for and was granted bail. There is no doubt that on the first of these points the weight of authority is very heavily on

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the side of the State. There are two decisions reported as *Sugan Chand* v. *Seth Narainda* (1), and *S. Y. Patel* v. *State* (2), in which the Courts took the view that the word 'is' in section 197, Criminal Procedure Code, referred to the time of the commission of the alleged offence, and not to the date on which the Court took cognizance of the case, but these views have been dissented from in *Suraj Narain Chaube* v. *Emperor* (3), *Prosad Chandra Banerjee* v. *Emperor* (4), and *Emperor* v. *P. A. Joshi* (5). There are as yet apparently no decided cases under section 6 of Act II of 1947, but both in section 197, Criminal Procedure Code, and in this section the relevant words are similar. The essential part of section 197 reads—

> "Or when any public servant who is not removable from his office * * * * *, is accused of any offence * * * * *; no Court shall take cognizance of such offence"

and the relevent words of section 6 are—

> "No court shall take cognizance of an offence * * * *, alleged to have been committed by a public servant, except with the previous sanction,—
>
> * * * * *
>
> in the case of a person who is employed."

In view of this form of wording in the two sections, clearly the same principles would apply to them in this matter. The views of the Calcutta and Bombay High Courts were that without any doubt the protection afforded by section 197, Criminal Procedure Code, was only intended to be enjoyed by judges, Magistrates and other public servants while still in office, and that no sanction was necessary for the prosecution of a Government servant who had already been discharged from service before the case was brought against him, and I entirely agree with this interpretation.

(1) A.I.R. 1932 Sind. 177
(2) A.I.R. 1937 Nag. 293
(3) A.I.R. 1938 All. 776 (S.B.)
(4) A.I.R. 1943 Cal. 527 (D.B.)
(5) A.I.R. 1948 Bom. 248

Finally, there is the question whether the trial Court could be said to have taken cognizance of the case merely by entertaining the respondent's bail application while he was still a public servant a week before he was discharged from service. In my opinion, the view of the learned Sessions Judge on this point was correct. It is not clear how the respondent's bail application came to be filed in the Court of this particular Magistrate, but it is suggested that the reason was that the learned Magistrate was a Special Magistrate dealing generally with cases of this type. It is, however, quite clear that at the time the bail application was filed and accepted by him the investigation was still far from complete, and that at a later stage either the case might be withdrawn, or it might go to the Court of some other Magistrate. Admittedly the meaning of the phrase "taking cognizance" has not been precisely defined in the Code of Criminal Procedure, but as the learned Sessions Judge has pointed out, bail applications are frequently considered both by sessions judges and by the High Court during the preliminary stages of cases and yet section 198 of the Code of Criminal Procedure provides that no sessions court shall take cognizance of any offence as a Court of original jurisdiction unless the accused has been duly committed, and section 194 provides for the circumstances under which a High Court may take cognizance of an offence. From this it can be deduced that the term 'taking cognizance' has no connection with entertaining a bail application while a case is still at the stage of a Police investigation. Moreover, many bail applications are dealt with by so-called "duty" Magistrates, in whose case it is merely a co-incidence if they subsequently have to deal with particular cases in which they have already dealt with bail application in their capacity as duty Magistrates. I, therefore, agree with the view that dealing with a bail application is something quite separate and distinct from taking cognizance of a case.

The net result is that while the case against the respondent must proceed against him under

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section 5(1)(c) of Act II of 1947, the case can proceed without any sanction as provided in section 6 of the Act. I would accordingly accept the recommendation of the learned Sessions Judge and set aside the order of the trial Court discharging the accused and remand the case to it for trial according to law. The other revision petitions which were put up for hearing along with this may now be returned for hearing by Single Judges and decision on the various points involved in the light of the decision on the first point decided above.

KHOSLA, J.—I agree.

FULL BENCH

Before Harnam Singh, Falshaw, and Soni, JJ.

THE COMMISSIONER OF INCOME TAX, DELHI,—*Petitioner*

versus

THE DELHI FLOUR MILLS COMPANY, LIMITED, DELHI,—*Respondent*

1952

December, 30th

Civil Reference No. 18 of 1952

Excess Profits Tax Act (XV of 1940)—Section 4—Excess Profits Tax, nature of—Net profits, meaning of—Commission payable to managing Agents on net profits—Whether excess profits tax to be deducted from the profits before arriving at the net profits—Agreement—Construction of, rule stated.

Clause II of the agreement between the assessee Company and its managing agents provided :

> "In consideration for acting as Managing Agents the Company should pay to the firm—a commission equal to ten per cent of the annual profits. Such net profits will be arrived at after allowing the working expenses, interest on loans and due depreciation, but without setting aside anything to reserves or other special funds."

The question referred to the High Court was :

> "Whether on a true construction of the Managing Agency Agreement between the assessee Company and its Managing Agents entered into in